

**OPINION
79-245**

May 7, 1979 (OPINION)

Mr. Tom P. Slorby
Ward County State's Attorney
Ward County Courthouse
Minot, North Dakota 58701

Dear Mr. Slorby:

This is in response to your letter of April 10, 1979, wherein you request an opinion of this office relative to certain applications of Chapter 12.1-30 of the North Dakota Century Code, commonly known as the Sunday Closing Law. You submit the following general observations and premises in your letter:

There has been a relatively significant clamor in our county of late regarding the Sunday Closing Law, enforcement thereof, and alleged violations. It seems to have been the practice of my predecessors to ignore rather insignificant possible violations when no complaints were made. I agree with that policy in relation to mere possible violations but we have now received a number of complaints.

I have reviewed your opinions dated April 27, 1976, November 19, 1978 and April 26, 1972 as well as a number of cases.

My first impression is that the Sunday Closing Law leaves a lot to be desired as to intent and definition.

We would request your opinion as to the application of the Sunday Closing Law to a number of general areas.

The first area deals with what is commonly known as flea markets. It is my understanding that the State Legislature failed to adopt a proposed exemption from the operation of the act for rummage sales and flea markets. I do not believe, however, that this is dispositive of the matter in that it is my opinion that the term flea market in and of itself has no legal significance but rather one must look to the actual composition of a flea market.

The situation that has presented itself to our office involves one person who sponsors a flea market one Sunday each month. This person rents the facility from the State Fair Association and in turn sublets booths or stalls to various independent persons. This person also operates a concession stand at the flea market.

It is my opinion that the concession stand is exempt under N.D.C.C. 12.1-30-02(2) and 12.1-30-03(1).

The various operations have ranged from individuals selling their own rummage, hobbyists selling their own artwork on occasion, to regular retail merchant interests selling their

retail products which they deal in on a regular basis during the other days of the week and apparently on a continuing basis, to and various nonprofit organizations or service organizations selling their products.

You then set forth various questions concerning the application of the law to certain specific circumstances. We shall attempt to respond to each in the order in which you have set the same out in your letter.

Your first question is as follows:

Is the sponsoring of a Sunday flea market, that is, the mere renting of space when the rental agreement is entered into and rent paid on some day other than a Sunday, a violation of the Sunday Closing Law per se and if not, would it be such if some of the individual booth or stall renter's conduct is a violation.

Initially we must consider the operation of a "flea market" generally, as the same is commonly known, both as to operation and as to its operation on Sunday, in view of the prohibitions contained in Chapter 12.1-30 of the North Dakota Century Code. While there may exist a legal definition of the term, we are aware that there exist many variations of the same, both as to operation, management and concept. For this reason we will consider the term as specified and described in your letter of inquiry for the purposes of this analysis.

Since your description of the operation of a flea market involves one person who sponsors the same, renting the facility and subletting to others, certain booths or stalls, as well as operating a concession stand himself, we can only conclude that the subject individual is engaging in business or in conducting a business for labor or profit. The business is conducted in a usual manner and location and is open to the public. Clearly this activity is contemplated by Section 12.1-30-01 of the North Dakota Century Code and within the prohibitions set forth therein. The fact that the rental agreement is entered into and rent paid on a day other than Sunday would not appear to affect the prohibition since the same applies to the conducting of the business or labor, which is admittedly being done on a Sunday. We assume that there is no claim being asserted to the exemption in the statute relative to those persons who in good faith observe a day other than Sunday as the Sabbath, refraining from engaging in or conducting business or labor for profit and closes his place of business to the public on that day.

Accordingly, and in direct response to your question, we are of the opinion that the sponsoring of a "flea market," as described in your letter of inquiry, is within the prohibition of Section 12.1-30-01 of the North Dakota Century Code, and that unless an exemption, as provided for by Sections 12.1-30-02 and 12.1-30-03 of the North Dakota Century Code can be established and claimed, that the same constitutes engaging in or conducting business or labor for profit and would be contrary to law and would constitute a class B misdemeanor. With regard to the individual booth or stall renter's conduct, if we were to assume that the operation were otherwise legal

and proper, it would appear that each business, being a component of the "flea market" concept, would necessarily need be determined on its own merits; however, as we have concluded that the operation itself is contrary to law, it would appear that our response need not consider the same. In any event, however, it appears clear that such renters would not enjoy an umbrella protection or insulation from the import and application of the law merely by being a component of a flea market type of business.

Your next question is as follows:

It is a violation of the Sunday Closing Law for a private individual to sell their own rummage, which I define as their own used personal property, or a hobbyist to sell his own personal artwork when these persons derive little if any of their income from such conduct. In other words is such conduct conducting business or operating a place of business open to the public on Sunday.

Section 12.1-30-01 of the North Dakota Century Code provides, in part, as follows:

12.1-30-01. BUSINESS OR LABOR ON SUNDAY - EXEMPTIONS - CLASSIFICATION OF OFFENSES.

1. Except as otherwise provided in sections 12.1-30-02 and 12.1-30-03, it shall be a class B misdemeanor for any person on Sunday to engage in or conduct business or labor for profit in the usual manner and location, or to operate a place of business open to the public, or to authorize or direct his employees or agents to take such action. This subsection shall not apply to any person who in good faith observes a day other than Sunday as the Sabbath, if he refrains from engaging in or conducting business or labor for profit and closes his place of business to the public on that day. (Emphasis supplied).

Whether such business activity as selling rummage by a private individual or a hobbyist selling his own personal artwork is contrary to the statute becomes a question of fact rather than by absolute declaration by the statute. It would appear that if such sales are not held in the usual manner and location and do not constitute "a place of business" open to the public, then quite likely the same would not be contemplated by the statute. On the other hand, if such businesses or sales were held in a usual manner and location, such as being held on a regularly scheduled basis, or if such sales were set up in such fashion as to generally constitute a "place of business," then it would appear that the same would be in violation of the prohibition set forth in Section 12.1-30-01 of the North Dakota Century Code. We do not believe, however, that an informal garage sale, or rummage sale, by a private individual, selling his own used property, on a nonregularly scheduled basis, would constitute the operation or conducting of a place of business which would be prohibited from operating on a Sunday.

Your next question is as follows:

The next question deals with nonprofit organizations. First

are nonprofit organizations excluded from the operation of the Sunday Closing Laws due to the language in N.D.C.C. 12.1-30-01 "to engage or conduct business or labor for profit" and if so does it also exempt situations wherein such associations sell the artwork of private individuals on a consignment basis or other arrangement wherein private artists receive payment for their work on Sunday.

We do not believe nonprofit organizations are excluded from the operation of the Sunday Closing Laws due to the language in Section 12.1-30-01 of the North Dakota Century Code, "to engage or conduct business or labor for profit." A nonprofit organization is so classified, not because it does not make money in its operation, but rather because it is not organized to profit any of the shareholders, organizers, incorporators, or others. The income received by such organization is rather applied to the purposes, intents, and endeavors of the organization, which are normally public or charity oriented.

Your next question is as follows:

Our next question deals with service organizations exempted by N.D.C.C. 12.1-30-03(27). Does such exemption allow service organizations to conduct all manner of business and transactions that they are otherwise legally able to do such as a YMCA selling Christmas trees on Sunday or is such exemption limited to the providing of the normal every day service of such organization.

We are of the opinion that the exemption set forth under Section 12.1-30-03(27) of the North Dakota Century Code allows service organizations to conduct only such normal every day service of such organization and business related directly therewith. We would note that the exemption provision of said Section 12.1-30-03 of the North Dakota Century Code provides as follows:

12.1-30-03. BUSINESSES ALLOWED TO OPERATE ON SUNDAY. - The operation of any of the following businesses shall be allowed on Sundays:

* * *

7. Service organizations (USO, YMCA, etc.).

* * *

(Emphasis supplied)

The statutory designation, providing for the operation of specified businesses, listing those businesses or activities and services allowable, would seem to limit the named businesses to their regular or usual activity. To hold otherwise would render the statute meaningless. It is also noted that each of the businesses specified under Section 12.1-30-03 of the North Dakota Century Code are those which are normally considered as necessary or protective on a daily basis, or which provide emergency services, and which are not inconsistent with the activity apparently intended by the statute to

be prohibited on Sunday. We are therefore of the opinion that the activity specified in your question, i.e., selling of Christmas trees by a YMCA on Sunday would be outside of the scope of the usual and regular business or activity of such a service organization as we understand it, and would therefore be a prohibited business activity on Sunday.

Your next question is as follows:

Another question deals with the grocery store exemption N.D.C.C. 12.1-30-03(28). Needless to say this exemption has resulted in a number of questions in the past again apparently as a result of the same ambiguities, intent and purpose as well as the absence of definitions which in my opinion permeate throughout the entire Sunday Closing Law. May a partnership that owns two grocery stores be open on Sunday provided that they do not regularly employ more than 3 employees at each store or is it necessary to look at the total number of employees at all stores owned by the partnership to determine if such a partnership is exempt from the operation of the Sunday Closing Law.

We would note the provisions of Section 12.1-30-03(28) of the North Dakota Century Code, providing for the exemption as follows:

12.1-30-03. BUSINESSES ALLOWED TO OPERATE ON SUNDAY. - The operation of any of the following businesses shall be allowed on Sundays:

* * *

8. Grocery stores operated by the owner-manager who regularly employs not more than three employees for the operation of said store.

* * *

(Emphasis supplied)

This office has previous occasion to address the issues presented by your question relative to the scope of Section 12.1-30-03(28) of the North Dakota Century Code, as amended, as the same relates to other than a singular "owner-manager" concept specified by the statute. We are herewith enclosing a copy of an opinion dated April 26, 1972, addressed to Mr. John O. Garaas, Cass County State's Attorney, and a copy of an opinion dated September 22, 1975, addressed to Mr. Robert P. Bennett, Assistant State's Attorney, Burleigh County, North Dakota, both of which expressed the opinion of this office relative to our interpretation of the subject statute.

Our previous opinions have expressed the "singular" aspect of the individual claiming the exemption in accordance with the singular aspect and specification of the statute. Accordingly, we hold to the concept that in order to claim the exemption under Section 12.1-30-03(28), the person must be a single individual acting in the dual role of "owner-manager," rather than a compound or concurrent interest of a combination of natural persons or a separate legal

entity such as a partnership or corporation. Such would appear to include the joint venture situation expressed in your letter of inquiry.

From this standpoint, then, it would appear that the question of how many employees are actually engaged in either or each or both of the stores would not be the determining factor and such questions would be moot.

Your next question is as follows:

One further matter that I have been requested by other persons to submit to you is the construction to be given to 12.1-32-02(2), "Food prepared for consumption on or off the premises where sold." It has been contended that this provision encompasses all food products including general grocery items and that therefore any business qualifying under the exemptions in 12.1-30-03 such as an automobile service station may sell any and all groceries on Sunday. It is the opinion of our office that 12.1-30-02(2) applies to food already prepared when delivered and not to general grocery items. Would you please advise as to the opinion of your office regarding this exemption.

We find that we are in accord with the opinion which you have expressed in the question, i.e., that Section 12.1-30-02(2) applies to food already prepared when delivered and not to general grocery items. In this connection we would note that the personal property specifically permitted to be sold is by the subsection 2 of the statute set forth as follows:

2. Food prepared for consumption on or off the premises where sold. (Emphasis supplied)

Clearly, general grocery items have not been prepared for consumption "on" the premises where sold. Accordingly, we believe that the exemption applies to those foods which have been specifically "prepared" for possible consumption on or off the premises where sold, at the purchaser's election, but that the same involves a "preparation" permitting contemplated immediate consumption rather than a preparation which permits storage and a future consumption.

We trust that the foregoing general observations, comments and enclosed materials will adequately set forth our opinion relative to the matters submitted and that the same will be sufficient for your purposes.

Sincerely,

ALLEN I. OLSON

Attorney General